

VERMONT LABOR RELATIONS BOARD

TOWN OF FAIR HAVEN	)	
	)	
and	)	DOCKET NO. 10-14
	)	
AFSCME LOCAL 1201, COUNCIL 93,	)	
AFL-CIO	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement of Case

On April 13, 2010, the Town of Fair Haven ("Town") filed a unit clarification petition, contending that the Chief Operator in the Water Treatment Plant is a supervisory employee, and requesting that the Chief Operator be excluded from the bargaining unit of Town employees represented by AFSCME Local 1201, Council 93, AFL-CIO ("Union"). On May 7, 2010, the Union filed a response to the petition, contending that the Chief Operator is not a supervisory employee and should remain in the bargaining unit represented by the Union.

A hearing was held on June 17, 2010, in the Labor Relations Board hearing room in Montpelier before Board Members Richard Park, Acting Chairperson; Gary Karnedy and Louis Lacroix. Town Manager Serena Williams represented the Town. Attorney Michael Blair of AFSCME Council 93 represented the Union. The Union and the Town filed post-hearing briefs on July 9 and 12, 2010, respectively.

FINDINGS OF FACT

1. Since 1992, pursuant to an election conducted by the Labor Relations Board, the Union has represented Town employees in a bargaining unit consisting of all the employees in the office, police department, cemetery, water department, sewer department, highway department and transfer station; excluding the Department of Public

Works Superintendent, Water and Sewer Superintendent, Chief of Police and Town Manager (Labor Relations Board Docket No. 92-34). These employees are covered by a collective bargaining agreement between the Town and the Union. One of the employees in the bargaining unit represented by the Union is John Root, Chief Operator of the Water Treatment Facility.

2. Public water systems in Vermont are governed by Subchapter 21-12, Water System Classification and Operator Certification, of the Vermont Water Supply Rule. Subchapter 21-12 provides that “(a)ll public water systems shall be operated by a certified operator of an appropriate class as defined in this subchapter.” A certified operator is one who meets the requirements of the subchapter and has a valid certification from the Secretary of the Department of Environmental Conservation. Subchapter 21-12 states:

The certified operator shall comply with the following requirements as a condition of his or her certification:

- (a) The certified operator(s) in responsible charge must hold a valid certification equal to or greater than the classification of his or her water system, including each treatment facility and distribution system, as determined by the Secretary.
- (b) The operator in responsible charge shall perform the following duties:
  - 1. Conduct visual inspections of the system’s source, source water protection area, storage facilities, and chemical addition systems at an appropriate frequency . . .
  - 2. Be familiar with all aspects of the treatment and distribution system operation of the water system.
  - 3. Oversee all bacterial monitoring, chemical monitoring, and other monitoring required under this Rule.
  - 4. Review the sample monitoring schedule and locations quarterly.
  - 5. Ensure that all samples are delivered to a certified laboratory in a timely manner.
  - 6. Inspect system within 24 hours of any positive fecal coliform result, positive Total Coliform repeat sample result, or other water system failures that threaten public health.
  - 7. Notify owner of any violation(s) of this Rule.

8. Ensure the accuracy of water meters and other flow measuring devices.
  9. Be responsible for measuring, and recording chemical additions.
  10. Operate and maintain chemical feed and all treatment systems.
  11. Keep abreast of changes in the drinking water regulations and safety regulations.
  12. Fulfill certification and certification renewal requirements.
  13. Operate and maintain system in accord with the Operation and Maintenance Manual.
  14. Attend all inspections as requested by state personnel.
  15. Oversee source water protection, watershed protection, and other activities associated with chemical waivers or otherwise required by this Rule.
  16. Keep complete and accurate water system records.
  17. Carry out all required reporting requirements including submitting a complete monthly report to the Secretary by the 10<sup>th</sup> day of the following month.
  18. Develop and maintain an accurate site plan showing the water source and distribution system.
  19. Respond to consumer complaints promptly.
  20. Comply with all applicable state and federal statutes, rule and orders governing water system regulation.
  21. Conduct all duties with reasonable care and judgment for the protection of public health, public safety, and the environment.
- (Union Exhibit 5)

3. Each public water system in Vermont is classified in one of five classes pursuant to Subchapter 21-12. The Fair Haven water system is placed in Class 4B, which is “for served populations between 501 and 3,300”. A certified Operator Class 4B is required to operate a Class 4B system. The Class 4B Operator is required to have a minimum of 2.5 years of operating experience to be a certified operator (Union Exhibit 5).

4. The Water Supply Division of the State of Vermont Department of Environmental Conservation administers Subchapter 21-12 of the Water Supply Rule. In June 2007, the Water Supply Division conducted a sanitary survey inspection of the Town’s water distribution system. During the investigation, the Water Supply Division

expressed its concern to Town Manager Serena Williams that the Town Department of Public Works employees who were maintaining the water distribution system were not properly certified under the requirements of Subchapter 21-12 of the Water Supply Rule. In response to this expressed concern, Williams indicated to the Water Supply Division by an August 2007 letter that Water Treatment Plant Chief Operator John Root would be responsible under his Class 4 Water Operator license for the work that would be performed by other employees on the water distribution system. The Water Supply Division determined that this arrangement met the requirements of Subchapter 21-12 of the Water Supply Rule (Union Exhibit 3).

5. On March 10, 2010, Williams had a telephone conversation with Tim Raymond, Manager of the Operations Section of the State Water Supply Division, concerning John Root's responsibilities for the Town water distribution system. On March 11, 2010, Raymond provided a written summary of the March 10 conversation to Williams in an e-mail. Raymond summarized what had occurred in 2007 set forth above in Finding of Fact No. 3, and then stated:

*Distribution System Maintenance Personnel Certification:* In accordance with the WSR, Subchapter 21-12, all Public Water Systems **shall** be operated by a certified operator of the appropriate class. While all of the personnel that work at the treatment plant are properly Certified Class 4C Operators, the distribution system maintenance personnel are not Certified Class D Operators. These distribution system maintenance personnel must all be properly certified to work on drinking water distribution systems, unless the work that they perform is being supervised, and/or managed by a Class 4 water operator. Currently, all operations concerning the distribution system are managed and supervised by the Water Systems Class 4C certified operator. If this condition should change you must notify this division immediately. We will assess this issue in the next scheduled inspection of the Water System.

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(Town Exhibit 2, Union Exhibit 3; emphasis in original)

6. Raymond made erroneous statements in his March 11 e-mail that all of the employees that worked at the Fair Haven treatment plant were Class 4C operators, and that all operation concerning the distribution system are managed and supervised by the Water Systems Class 4C certified operator. The respective employees were all Class 4B operators, not Class 4C.

7. On March 23, 2010, the Town Selectboard approved a changed job description for the position occupied by John Root. The title of the position is changed to Water Treatment Facility Chief Operator/Systems Superintendent. Included among the "Duties and Responsibilities" of the position is the following description: "(Works under the general supervision of the Town Manager and) is responsible for the supervision/management of the Water Treatment Facility, reservoirs and water shed areas, the two water storage tanks and distribution system." In changing Root's job description, the Town determined that Root is a supervisor who should be removed from the bargaining unit represented by the Union (Union Exhibit 2, Town Exhibit 2).

8. On April 28, 2010, Williams sent a letter to Union representative George Lovell, enclosing the changed job description and a copy of the March 11 e-mail letter from Raymond. Williams stated in the letter that the changed job description "is based on the instruction that we received in March" from Raymond providing "These distribution system maintenance personnel must all be properly certified to work on drinking water distribution systems, unless the work that they performed is being supervised, and/or managed by a class 4 Water Operator." (Union Exhibit 4)

9. Julie Hackbarth, Compliance and Certification Manager of the State Water Supply Division, sent a letter to Williams dated May 28, 2010. It provided in pertinent part:

Subchapter 21-12.1.3 of the State of Vermont Water Supply Rules states that the owner of a public community water system shall place the direct supervision of the water system, including distribution, under the responsible charge of the designated certified operator(s). Any designated operator must hold a valid certification for the classification of the water system. Since the Fair Haven Water System is a Class 4B water system, a Class 4B certified operator is required to manage the treatment facility and a Class 4B or D certified operator is required to manage the distribution system. The Town of Fair Haven has reported to the VT Water Supply Division that Mr. John Root is a designated operator and has operational control over the entire Fair Haven Water including the distribution system. Mr. Root currently holds a Class 4B certification.

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(Town Exhibit 1)

10. Hackbarth accurately indicated in her letter that the Fair Haven water system is a Class 4B water system, and that John Root holds a Class 4B Water Operator certification and is the Town's designated certified operator under Subchapter 21-12 requirements.

11. Root spends the bulk of his work duties as Chief Operator of the Town Water Treatment Facility. He operates the facility with one other employee, Assistant Chief Operator Greg Marcy. Marcy also is licensed as a Class 4B Water Operator. Root and Marcy are involved in facility operation, maintenance and water testing. Marcy reports to Root. Root directs the work of Marcy as necessary on non-routine matters. Marcy relies on Root to instruct him to resolve problems that arise at the water treatment facility. Root has taken action which he has considered to be discipline against the assistant chief operator on a few occasions in the 23 years Root has been employed by the

Town. Evidence was not introduced on the specific action taken by Root on these occasions.

12. In addition to his duties at the Water Treatment facility, Root is responsible for the entire Town water distribution system. He is responsible for the water from the source to the drinking tap to ensure there is safe drinking water. The Town Department of Public Works (“DPW”) employees maintain the Town water distribution system as necessary outside of the Water Treatment facility. None of the DPW employees are certified operators under Subchapter 21-12 of the Water Supply Rule. This resulted in the Town designating Root as the certified operator meeting the requirements of Subchapter 21-12 to be responsible for the water distribution work performed by the DPW employees. Root spends approximately one-eighth of his working time overseeing this maintenance work of the DPW employees. Marcy never oversees the water distribution work done by DPW employees.

13. There is a variety of water distribution maintenance work done in the Town by DPW employees. The work includes flushing water hydrants, repairing water line breaks, curb stops and hooking up new residential water lines. Town water hydrants are flushed twice a year. There have been approximately 12 water line breaks that have needed to be fixed in the last three years. Curb stop work, which involves a secondary water stop between a private residence or business and the Town water system, is done infrequently by DPW employees when they have open time in their schedule. The DPW employees hook up new residences to the Town water lines as necessary. John Root oversees, and is responsible for, this water distribution maintenance work in his role as the Town’s designated certified operator of the Town water system.

14. Jack Eaton, the DPW Superintendent, schedules all work of DPW employees, including working on the water distribution system. Eaton assigns DPW employees to jobs.

15. John Root is responsible on a 24 hour, 7 days a week basis to address any water distribution emergencies that exist in the Town. The only time he is not subject to being called in to perform this work is if he is out of the area. If Root was unavailable and a water line break occurred, Eaton probably would oversee the line repair and report to Root on what occurred.

16. Most of the water distribution system work done by DPW employees is routine. There is only one correct way to perform much of the work. John Root has to exercise independent judgment in directing the water distribution work of the DPW employees on a small percentage of jobs. In overseeing the work done by DPW employees, Root often will visit the job site, provide input and direction if necessary, and then leave. His involvement on a job typically is more limited and intermittent than DPW Superintendent Eaton.

17. In addition to John Root and Greg Marcy, the Town has two other Class 4B Water Operators: Pete Laramie, Chief Operator of the Town Waste Water Treatment Plant; and Peter Root, Assistant Chief Operator of the Town Waste Water Treatment Plant. Laramie and Peter Root have never been involved in the water distribution maintenance work done by DPW employees and overseen by John Root.

### OPINION

The Employer, through the filing of a unit clarification petition with the Board, requests that the Town of Fair Haven Water Treatment Facility Chief Operator/Systems



Superintendent be removed from the bargaining unit of employees of the Employer represented by the Union. Under Section 34.1 of the Board Rules of Practice, a petition for clarification of an existing bargaining unit may be filed where “there is a dispute over the unit inclusion or exclusion(s) of employee(s)”. The Employer contends that the Water Treatment Facility Chief Operator/Systems Superintendent should be excluded from the unit as a supervisory employee. The Union contends that the Water Treatment Facility Chief Operator/Systems Superintendent is not a supervisor and should remain in the bargaining unit.

Thus, we need to decide whether the Water Treatment Facility Chief Operator / Systems Superintendent is a supervisor. Under the Municipal Employee Relations Act, supervisors are excluded from collective bargaining rights.<sup>1</sup> The definition of "supervisor" is:

an individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees or responsibility to direct them or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.<sup>2</sup>

In order to be considered a supervisor, an employee must pass two tests: 1) the possession of any one of the listed powers in the statutory definition; and 2) the exercise of such powers "not of a merely routine or clerical nature but requiring the use of independent judgment".<sup>3</sup> The statutory test is whether or not an individual can effectively exercise the authority granted him or her; theoretical or paper power will not make one a

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<sup>1</sup> 21 V.S.A. §1722(12)(B).

<sup>2</sup> 21 V.S.A. §1502(13); 21 V.S.A. §1722(12)(B).

<sup>3</sup> Firefighters of Brattleboro, Local 2628 v. Brattleboro Fire Department, Town of Brattleboro, 138 Vt. 347 (1980).

supervisor. Nor do rare or infrequent supervisory acts change the status of an employee to a supervisor.<sup>4</sup>

The existence of actual power, rather than the frequency of its use, determines supervisory status.<sup>5</sup> However infrequently used, the power exercised must be genuine.<sup>6</sup> Also, the Board has discretion to conclude supervisory status does not exist although some technically supervisory duties are performed, if such duties are insignificant in comparison with overall duties.<sup>7</sup> Otherwise, an employer could circumvent the very spirit and intent of the statute by creating de minimus supervisory duties for the sole purpose of excluding classes of employees from union representation.<sup>8</sup>

In applying these standards to the facts of this case, we first note that there is no evidence that the Water Treatment Facility Chief Operator/Systems Superintendent has ever exercised the power to hire, transfer, suspend, layoff, recall, promote, discharge or reward employees; or to adjust their grievances; or to effectively recommend such actions. He has taken action which he considered to be discipline against the Assistant Chief Operator of the Water Treatment Facility on a few occasions in the 23 years he has been employed by the Town. However, evidence was not introduced as to the specific action taken by the Water Treatment Facility Chief Operator/Systems Superintendent on these occasions. Further, although the Water Treatment Facility Chief Operator/Systems Superintendent has responsibilities concerning the water distribution work performed by Department of Public Works (“DPW”) employees, there is no evidence that he has been involved in specific disciplinary action taken against DPW employees.

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<sup>4</sup> Id. at 351.

<sup>5</sup> AFSCME Local 490 and Town of Bennington, 153 Vt. 318 (1989).

<sup>6</sup> Id.

<sup>7</sup> Id.

<sup>8</sup> Id.

We conclude that this evidence is not sufficient to indicate that he possesses supervisory authority with respect to the discipline of employees. In cases where the ability of an employee to discipline, or effectively recommend discipline, has been at issue, the authority to take a specific disciplinary action or effectively recommend a specific disciplinary action must be demonstrated for supervisory status to be found.<sup>9</sup> Evidence that an employee has taken unspecified actions against a subordinate on a few occasions over many years of employment falls short of demonstrating supervisory authority to take a specific disciplinary action or effectively recommend a specific disciplinary action.

This leaves the remaining question whether the Water Treatment Facility Chief Operator/Systems Superintendent's responsibility to assign work to employees or direct them rises to a level sufficient to make him a supervisor. The key determination is whether the employee is exercising independent judgment, or is simply ensuring that standard operating procedures are followed. If an employee is relaying instructions from a supervisor or ensuring that subordinates adhere to established procedures, the employee is not a supervisor.<sup>10</sup> However, if an employee's duties go beyond simply ensuring established policies and procedures are followed, and require use of independent judgment in directing and assigning employees, then the employee meets the statutory definition of supervisor.<sup>11</sup> Exercise of independent judgment in assigning and directing

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<sup>9</sup> Colchester Police Officers Association and Town of Colchester, 26 VLRB 9, 17 (2003). Teamsters, Local 597 and Burlington Housing Authority, 9 VLRB 85 (1986).

<sup>10</sup> Local 1201, AFSCME and City of Rutland, 10 VLRB 141 (1987). City of Winooski and Winooski Police Employees' Association, 9 VLRB 85 (1986).

<sup>11</sup> South Burlington Police Officers' Association and City of South Burlington, 11 VLRB 332 (1988). c.f., South Burlington Police Officers' Association and City of South Burlington, 18 VLRB 116 (1995).

employees must occur on a more than infrequent basis or be significant in comparison with overall duties to make one a supervisor.<sup>12</sup>

The Water Treatment Facility Chief Operator/Systems Superintendent directs the work of the Assistant Chief Operator of the Water Treatment Facility on non-routine matters with respect to their shared responsibilities of facility operation, maintenance and water testing. The Assistant Chief Operator relies on him for instructions to resolve problems that arise at the facility. We conclude that the Water Treatment Facility Chief Operator/Systems Superintendent is exercising independent judgment in this regard in directing the work of the Assistant Chief Operator.

Nonetheless, an employee is not a supervisor if there is only one employee under his or her direction. The statutory language is in the plural, requiring supervisory authority over employees for an individual to be considered a supervisor.<sup>13</sup> The Employer relies on the responsibilities of the Water Treatment Facility Chief Operator/Systems Superintendent with respect to overseeing the maintenance work of DPW employees on the Town water distribution system to contend that these responsibilities make him a supervisor.

The Water Treatment Facility Chief Operator/Systems Superintendent's duties concerning the Town water distribution system are important. He is responsible for the water from the source to the drinking tap to ensure there is safe drinking water. He is available on a 24 hour, 7 days a week basis to address any water distribution emergencies

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<sup>12</sup> AFSCME Local 490 and Town of Bennington, 153 Vt. at 323. Department of Public Safety Personnel Designation Disputes (re: State Police Sergeants), 14 VLRB 176 (1991).

<sup>13</sup> United Electrical, Radio and Machine Workers of America and University of Vermont, 20 VLRB 219, 262-64 (1997). Agency of Transportation Designation Disputes, 19 VLRB 267, 271 (1996). South Burlington Police Officers Association and City of South Burlington, 11 VLRB 332, 338 (1988). Local 1201, AFSCME and City of Rutland, 10 VLRB 141, 151 (1987). City of Winooski and Winooski Police Employees Association, 9 VLRB 85, 91 (1986). Health Dept. Personnel Designation Dispute (Re: Supervisory Chemist, Toxicology), 5 VLRB 245, 247 (1982).

that exist in the Town. The DPW employees maintain the water distribution system, and the Water Treatment Facility Chief Operator/Systems Superintendent is the certified operator under Subchapter 21-12 of the Water Supply Rule responsible for the water distribution work performed by the DPW employees.

However, although his water distribution system responsibilities are significant and essential, we conclude that his assigning and directing responsibilities over DPW employees in this regard do not make him a supervisor. He does not schedule the work of DPW employees on the water distribution system or assign them to such jobs. Instead, the DPW Superintendent schedules the water distribution work done by DPW employees and assigns them to jobs.

Further, although the Water Treatment Facility Chief Operator/Systems Superintendent oversees the water distribution work of the DPW employees, he spends only about one-eighth of his time overseeing such work and most of the work is routine. He has to exercise independent judgment in directing the water distribution work of the DPW employees only on a small percentage of jobs. His involvement on a job typically is more limited and intermittent than the DPW Superintendent.

The Board has determined in previous cases that working forepersons were not supervisory employees because effective supervisory authority over public works employees resided with the public works director.<sup>14</sup> Similarly here, effective supervisory authority over DPW employees with respect to assigning and directing them resides with the DPW Superintendent, not the Water Treatment Facility Chief Operator/Systems Superintendent. The Water Treatment Facility Chief Operator/Systems Superintendent

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<sup>14</sup> City of St. Albans and Local 1343, AFSCME, AFL-CIO, 7 VLRB 48 (1984). AFSCME and Town of Windsor, 6 VLRB 197 (1983).

oversees the quality of the water distribution maintenance work of the DPW employees much like a quality control manager, but he does not supervise them within the meaning of the Municipal Employee Relations Act.

In sum, we conclude that the Water Treatment Facility Chief Operator/Systems Superintendent's responsibilities overseeing the water distribution maintenance work of the DPW employees do not combine with his directing responsibilities over the Assistant Chief Operator of the Water Treatment Facility to make him a supervisory employee. His exercise of independent judgment in directing employees is not significant in comparison with his overall duties to make him a supervisor.

#### ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is ordered that the unit clarification petition filed in this matter by the Town of Fair Haven is dismissed, and the Water Treatment Facility Chief Operator/Systems Superintendent shall be included in the existing bargaining unit of Town employees represented by AFSCME Local 1201, Council 93, AFL-CIO.

Dated this \_\_\_\_ day of September, 2010, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

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Richard W. Park, Chairperson

/s/ Gary F. Karnedy

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Gary F. Karnedy

/s/ Louis P. Lacroix

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Louis P. Lacroix